85-323

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

B & G CRANE SERVICE, INC.
Plaintiff/Appellant

V.

DOLPHIN TITAN INTERNATIONAL, INC.
Defendant/Appellee

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Fifth Circuit Court of Appeals has violated the "clearly erroneous" Standard of Rule 52-A, Federal Rules of Civil Procedure?

II. Whether the United States Fifth Circuit Court of Appeals overlooked or misapprehended well-settled jurisprudential principals or interpretations of the effects of the Mississippi Statute of Fraud, Mississippi Revised Statutes Annotated, Section 15-3-1?

III. Whether or not the United States Fifth Circuit Court of Appeals' findings are supported by the evidence?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiff/Appellant, B & G Crane Service, Inc., certifies that the following listed persons have an interest in the outcome of this case:

B & G Crane Service, Inc.	Plaintiff/Appellant
Dolphin Titan International, Inc.	Defendant/Appellee
James G. Burke, Jr.	Attorney for Defendant/Appellee
Burke & Mayer	Attorneys for Defendant/Appellee
Melvin G. Ripp, Jr.	Attorney for Plaintiff/Appellant
Stumpf, Dugas, LeBlanc, Papale & Ripp	Attorneys for Plaintiff/Appellant

NOTE: Pursuant to Rule 28, B & G Crane Service, Inc. does not have any parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, entitled *B & G Crane Service, Inc. v. Dolphin Titan International, Inc.*, Case No. 84-3552, appears as Appendix "A" attached hereto.

The judgment, findings of fact, and conclusions of law of the United States District Court for the Eastern District of Louisiana, the Honorable Patrick E. Carr presiding, appear as Appendix "B" attached hereto.

Petitioner subsequently filed a petition for rehearing, directed to the Fifth Circuit panel that heard the case. The petition for rehearing was denied on July 25, 1985. A copy of said denial appears as Appendix "C" attached hereto.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Louisiana signed on July 24, 1984, a "Findings of Fact and Conclusion of Law" in favor of the petitioner. The United States Court of Appeals for the Fifth Circuit overturned the trial court's decision and propounded an opinion, dated June 17, 1985. The Fifth Circuit Court of Appeals subsequently denied petitioner's petition for a rehearing on July 25, 1985.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1254(1) and Rule 17 (a) (c) of the Rules of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 52(a), in relevant part provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Mississippi Revised Statutes Annotated, Section 15-3-1 in relevant part provides:

"An action shall not be brought whereby to charge on defendant or other party: (a) upon any special promise to answer for the debt or default or miscarriage of another person . . . unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing."

STATEMENT OF THE CASE

Ronnie Gonzales, d/b/a Gonzales Marine Enterprises, Inc. (hereinafter referred to as "Gonzales") contracted with Dolphin Titan International, Inc. (hereinafter referred to as "Dolphin") for the construction of two cantilevered jack-up work-over rigs. The contract between Gonzales and Dolphin was for the full and true sum of $12,300,000.00.

Thereafter, Gonzales rented heavy cranes and mats from B & G Crane Service, Inc. (hereinafter referred to as "B & G") for use in the construction of the rigs.

Immediately after the contract between Gonzales and Dolphin was signed, an Addendum was signed by the parties because Ronnie Gonzales only had approximately $1,000.00 net worth, a sum insufficient to secure a performance bond as required by the initial contract.

At this time, Dolphin took control of the contract as well as the shipyard, because Gonzales was defaulting in its rental payments to suppliers and laborers. At the time the work began to construct rigs No. 105 and No. 106 for Dolphin, Dolphin had complete control and directly participated with full authority in the construction of its two rigs.

B & G communicated to Dolphin the fact that, as Gonzales had defaulted in their financial responsibilities to B & G, they were going to remove their leased equipment from the job site. Dolphin's president (E. D. Shepard) and secretary (Charles Van Duzer) each promised that Dolphin would guarantee payment to B & G for the rental of its equipment in order that the Dolphin rigs could be completed.

In order that B & G's financial concern might be satisfied, B & G was informed by Dolphin of a zero balance account at the Whitney National Bank in New Orleans, as well as a bank officer whom B & G could consult in an attempt to determine whether or not the financial representa-

tions of Dolphin were, in fact, accurate and substantive. After being convinced of Dolphin's intentions and financial wherewithal, B & G continued to lease their cranes and mats, in addition to sending another crane and several other mats to a job site to be used by Dolphin in the construction of its rigs. The zero balance account was used in connection with an existing account in the Gonzales name and all Gonzales checks would be drawn against the zero balance account. Any of the Gonzales checks had to be approved and signed by a designated Dolphin employee. When an overdraft reached the bank, a debit on Dolphin's account in the amount of the check would be had and a credit would issue to the Gonzales account for a like amount. At all times, Gonzales' account would have a zero balance before and after each transaction.

The only rebuttal witness at this trial was Chari Necaise, who substantiated the facts as represented by B & G, that E. D. Shepard, president of Dolphin, in an attempt to complete his company's construction project of their rigs No. 105 and No. 106, spent considerable time contracting, hiring, and guaranteeing the bills of other subcontractors, necessary to the completion of Dolphin's rigs.

The trial court at no time concluded in its "Findings of Fact" that Dolphin had paid Gonzales the full contract price of $12,300,000.00. The only evidence of record is simply that of cost overruns and there is no direct substantive best evidence to the effect that Dolphin paid Gonzales a contract price.

B & G instituted civil action No. 83-2613, in the United States District Court for the Eastern Division of Louisiana, asking for $173,058.27 for the balances due for equipment rental based upon Dolphin's representations of financial responsibilities and commitment to B & G to pay for the rental of their equipment used directly in the construction of their rigs.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

This is an appeal from a decision of the Fifth Circuit Court of Appeals overturning the decision of the United States District Court, Eastern District of Louisiana. The jurisdiction of said District Court was based upon diversity of citizenship and an amount in controversy exceeding $10,000.00 pursuant to Title 28 of the United States Code, Section 1332.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

1. The United States Fifth Circuit Court of Appeals misapprehended and misapplied Federal Rule of Civil Procedure 52(a), which states straightforwardly that "Findings of fact shall not be set aside unless clearly erroneous."

The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of a broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same "clearly-erroneous" standard applies to findings based on documentary evidence as well as to those based entirely on oral testimony. *United States v. United States Gypum Co.*, 333 U.S. 364, 68 S. Ct. 525 (1948). The presumption of correctness has greater force in the situation where findings are based on oral testimony. *Bose Corp. v. The Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984).

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact and with experience in pursuing that role comes expertise. Duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determina-

tion at a huge cost and diversion of judicial resources. *Anderson v. City of Bessemer, N.C.*, 105 S. Ct. 1504 (1985).

In the instant case, the trial court had the unique opportunity to evaluate the credibility of the witnesses to weigh the evidence. The evidence of record supported the findings of fact of the trial court that the agreement between the parties was non-gratuitous and an exception to the Statute of Fraud.

If the district court's account of evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of facts, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177 (1949); See also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S. Ct. 2182 (1982).

When findings are based on determination regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding and belief in what is being said. *Wainwright v. Witt*, 105 S. Ct. 844 (1985).

The question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. It is respectfully submitted that the United States Fifth Circuit Court of Appeals erred in setting aside the findings of fact of the trial court that were not clearly erroneous.

2. The United States Fifth Circuit Court of Appeals did not apply well-settled jurisprudential principals or interpretations of the Mississippi Statute of Fraud.

The Mississippi Courts have interpreted the provisions of the Mississippi Code relating to the promises to pay the debt of a third party to be applicable to a gratuitous promise, but not a non-gratuitous promise.

In this case, the trial court determined there to be a non-gratuitous promise by Dolphin to pay B & G for the rental of their cranes and mats which were used at all material times herein and specifically for the purpose of completing and constructing Dolphin's jack-up rigs No. 105 and No. 106.

The Fifth Circuit Court of Appeals reasoned that Dolphin would receive no benefit as a promissor or contractor from B & G, and it is respectfully submitted that under Mississippi law, all that is needed to constitute the consideration to support an agreement or contract is either a benefit to the promissor (Dolphin) or a detriment to the promissee (B & G), and that, since both of those requirements exist, there is sufficient consideration flowing unto Dolphin. *Arledge v. Gulf Oil Corp.*, 578 F.2d 130.

It is respectfully submitted that it is a well established doctrine of substantive law of Mississippi that the mere failure to discharge a monetary obligation on a verbal contract, one otherwise completed, does not render such contract unenforceable under the Statute of Fraud. *Fromkling v. Berry, 88 So. 331* (an authority cited therein).

It is further respectfully submitted that in reviewing the Statute of Fraud, the Mississippi Supreme Court has held in a case most parallel to the one at bar. The case involved the rental of crane equipment to a subcontractor and the prime contractor orally agreed to pay for the equipment. The Mississippi Supreme Court held that such an oral agreement by the prime contractor to pay for the crane rental to the subcontractor was not within the Statute of Fraud because there was a determination by the trier of fact that the owner of the crane equipment posed that he was

renting the crane to the prime contractor, or that person who orally agreed to pay for it. The Mississippi Supreme Court went on further to note that even though the owners of the cranes and another person operating the equipment were paid through a subcontractor, because the prime contractor directed the crane owner to submit bills to the subcontractor for the rent, this did not preclude the crane owner from asserting a contract with the prime contractor, and did, in fact, estop the prime contractor from denying a primary obligation to pay the crane owner's rental on the basis of his oral agreement. *General Electric Co. v. Hans,* 133 So.2d 275, S.Ct. of Miss.

Dolphin has received the full benefit and use of the jack-up rigs No. 105 and No. 106, which formed the basis of this litigation, and to allow them to not pay for the services used in the construction of the rigs would cause Dolphin to be unjustly enriched. The Mississippi Courts have recognized on several occasions the equitable doctrine of unjust enrichment despite the Statute of Fraud. *Carter v. Witherspoon,* 126 So.2d 388, 156 Miss. 597, reaffirmed in *Jackson v. Sam Finely, Inc.,* 366 F.2d 148 (5th Cir., 1966), *McKeller v. Brown,* 404 F.2d 550 (Miss. S.Ct. 1981).

If an oral contract cannot be enforced by way of the prohibition of the Mississippi Statute of Fraud or damages may not be collected as a result of said statute, there is a general rule that the party breaking the contract (Dolphin) will not be permitted to obtain benefits from the contract to his unjust enrichment. The Mississippi Supreme Court has reasoned that the Statute of Fraud will not be used to permit one relying on the contract, contrary to the Statute of Fraud, the enrich himself, at the expense of another (B & G). *McKeller v. Brown, supra.*

3. The United State Fifth Circuit Court of Appeals' findings are not supported by the evidence. By way of substantive law, appellate courts are not able to review factual determinations made by the trial court. An appellate court cannot substitute its interpretations of the evidence

for that of the trial court simply because the reviewing court might give the facts another construction or resolve the ambiguities differently. *United States v. Real Estate Boards,* 339 U. S. 485, 70 s. Ct. 711 (1950).

The United States Fifth Circuit Court of Appeals based their reversal of the trial court on the supposed payment by Dolphin to Gonzales of the contract price of $12,300,000.00.

It is respectfully submitted that in order to prove a fact, there must be direct or circumstantial evidence to substantiate the fact. In the instant case, there was no testimony by the president or secretary of Dolphin regarding payment by Dolphin to Gonzales of the alleged contract price. At some point during the course of the trial, one of the parties should have either subpoenaed the business records of Dolphin to show complete payment for the alleged contract price or have had a custodian or other qualified witness to properly identify the report or to testify as to the contents of any records to show the full payment. *Bird v. Hunt Tool Shipyards, Inc.,* 650 F.2d 44 (CA 5th 1981).

It is respectfully submitted that to prove the content of a writing, i.e., as some form of evidence of payment of the alleged contract price, Dolphin should have placed of record the writing ledgers and/or books and/or canceled checks showing payment by way of their originals or a competent witness who could testify as to the contents of those originals.

The reviewing court oversteps the bounds of its duty if it undertakes to duplicate the role of the lower courts. In applying the clearly-erroneous standard to findings of the district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 89 S. Ct. 1562 (1959).

CONCLUSION

Dolphin did not show the district trial court or the United States Fifth Circuit Court of Appeals any evidence that it paid for B & G's services, yet it has admitted receiving their constructed rigs No. 105 and No. 106, and this writer suggests at the expense of B & G. The district trial court caused to be made familiar with the local trading customs and substantive law of the State of Mississippi, heard the testimony of witnesses, judged their credibility, and determined that Dolphin should have paid for what they received from B & G. The decision of the United States Fifth Circuit Court of Appeals to make a factual finding violates the "clearly-erroneous" standard of the Federal Rule of Civil Procedure 52(a), and plaintiff/appellant respectfully requests that the decision of the United States Court of Appeals be reversed.

RESPECTFULLY SUBMITTED:

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Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this application has been served upon counsel for respondents:

Mr. James Burke, Jr.
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New Orleans, Louisiana 70163

by placing a copy of same in the United States Mails, postage prepaid, addressed as described above, in accordance with Rule 28(5) (b) of the Rules of this Honorable Court, on this 20th day of August, 1985.

MELVIN RIPP, JR.

85-323

NO.

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APPENDIX "A"

B & G CRANE SERVICE
Plaintiff-Appellee

v.

DOLPHIN TITAN INTERNATIONAL, INC.
Defendant-Appellant

No. 84-3552.

United States Court of Appeals,
Fifth Circuit

June 17, 1985

Appeal from the United States District Court for the Eastern District of Louisiana

Before REAVLEY, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Dolphin Titan International, Inc., owner of two jack-up drilling rigs, appeals a judgement enforcing its alleged oral promise to guarantee the debt of the rigs' contractor. Persuaded that the district court misapplied the Mississippi statute of frauds to the facts it found, we reverse.

I

Dolphin contracted with Gonzales Marine Enterprises, Inc. for the construction of two offshore jack-up drilling rigs at a contract price of $12.3 million. Gonzales leased several cranes and construction mats for B & G Crane Service, Inc. for use in constructing Dolphin's rigs. Gonzales eventually defaulted on its contract with Dolphin and all subcontractors on the job site ceased further activity. B & G Crane Service then sued Dolphin for the rental balance owed it by Gonzales, alleging that Dolphin had breached its oral promise to pay for the rental of the B & G equipment used in the construction of its rigs.[1]

When Gonzales fell behind in its rental payments to B & G, the crane company threatened to remove its leased equipment and refused to rent Gonzales an additional requested crane. Both Dolphin's President and Secretary then orally promised B & G "that Dolphin would guarantee payment of the B & G rental bill." In reliance on those promised, B & G leased the additional crane and allowed the existing equipment to remain at the construction site. Dolphin established a zero balance account at the Whitney National Bank of New Orleans to pay the B & G bills. Using an existing Gonzales account, Gonzales checks were approved by a Dolphin employee and drawn against a zero balance. When the overdraft reached the bank, the bank

[1] B & G Crane Service, a Louisiana resident, initially filed its contract claim in Louisiana state court. Dolphin, a Delaware corporation with a Texas principal place of business, removed the action to federal court on grounds of diversity. 28 U.S.C. § 1441. We recite the facts found by the district judge after a bench trial.

would debit a Dolphin account and credit the Gonzales account for the amount of the check; a zero balance in the Gonzales account existing before and after each transaction.

Applying Mississippi law to these facts,[2] the district court held that the Mississippi statute of frauds applicable to promises to pay a third party's debt, covered only gratuitous promises. As Dolphin received a benefit from the equipment supplied by B & G, its promise was non-gratuitous and the statute of frauds inapplicable. The court additionally held that "(t)o deny recovery to B & G would permit Dolphin to be unjustly enriched at the expense of B & G." Mississippi's equitable doctrine of unjust enrichment, the court concluded, permitted recovery notwithstanding the statute of frauds. The court rendered judgment against Dolphin for "the value of use of the equipment provided by B & G."

II

Section 15-3-1 of the Mississippi Revised Statutes requires that "any special promise to answer for the debt or default or miscarriage of another person" be in writing to

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[2] A threshold issue below was whether Louisiana or Mississippi law controlled. The district court appled Louisiana's conflicts rules to conclude that "Mississippi ha[d] the greater interest in the application of its law" because the rigs were constructed in Mississippi, Gonzales was incorporated in Mississippi, B & G delivered its equipment to Gonzales' Mississippi shipyard, and the alleged oral promise was made at the Mississippi job site. Choice of law is not at issue.

be enforceable.[3] The statute contains no exception for non-gratuitous guarantees. In making such a distinction, the district court relied on dicta in *Carolina Transformer Co. v. Anderson,* 341 So.2d 1327 (Miss. 1977). While the Mississippi Supreme Court there stated that "the situation contemplated by the statute of frauds is a gratuitous promise by a third party to pay a creditor for debts of the debtor, " *id.* at 1330, it did so solely to demonstrate the statute's inapplicability to the facts before it. The statute of frauds played no part in the *Carolina Transformer* holding because the defendant there was not a third party to the contract sued upon. Had Dolphin independently leased the equipment from B & G Crane, instead of simply agreeing to guarantee Gonzales' debt, the statute of frauds would pose no bar. *See, e.g., Thomas McFarland Lumber Co. v. Selby,* 129 Miss. 894, 93 So. 434, 435 (1922); *Delta Lumber Co. v. Wall,* 119 Miss. 350, 80 So. 782 (1919). But Dolphin was not in direct privity with B & G. All purchase orders for the rental equipment ran from Gonzales Marine to B & G Crane Service. Similarly, all invoices ran from B & G to Gonzales and were paid by checks drawn on Gonzales' separate account. As Dolphin was a third party with respect to the B & G and Gonzales contract, *Carolina Transformer* is inapposite.

---

[3] Miss.Rev.Stat.Ann. § 15-3-1 provides in pertinent part:
An action shall not be brought whereby to charge a defendant or other party: (a) upon any special promise to answer for the debt or default or miscarriage of another person...unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

Mississippi courts have addressed situations virtually identical to that before us. In *Phillips v. F.G. & H. Millwork Manufacturing Co.*, 190 So.2d 843 (Miss.1966), for example, a contractor, Watts, agreed to furnish all labor and materials for the construction of Phillips' home. Watts subcontracted the materials from F.G. & H. Millwork; the supply invoices charged directly to the contractor. The subcontractor then sued Phillips, alleging that she had promised F.G. & H. by telephone that she would be responsible for the materials used in constructing her house. Phillips had discharged her debt with Watts, and denied ever agreeing to pay F.G. & H. Millwork for the materials. The Mississippi Supreme Court held that Phillips was in no way liable to the subcontractor, reasoning that "such an oral agreement on the part of (Phillips) to be liable for the debt of Watts is invalid under the provisions of the Statute of Frauds." *Id.* at 845.

Likewise in *King v. Hankins,* 209 So.2d 190 (Miss.1968), King contracted with Bowden to build a house. Bowden purchased the materials from Hankins. After Bowden abandoned the project without paying Hankins, the materialman sued King. The Mississippi Supreme Court found that there was no evidence that King had entered into an original contract with Hankins; invoices were made out to Bowden and Bowden remained liable for them. As King owed nothing to the contractor, the materialman no longer had recourse against King. "[M]oreover," the court held, "an oral agreement to be liable for the debt of Bowden would be invalid under the statute of frauds." *Id.* at 191. *See also Turman v. Tupelo Brich & Tile Co.*, 187 Miss. 33, 192 So. 40, 41 (Miss.1939)

(owner not liable to subcontractor when "[t]here was no promise *in writing* by [owner] to pay the debt of [contractor]").; *United States Fidelity & Guaranty Co. v. Parsons,* 154 Miss. 587, 122 So. 544, 550 (1929) (alleged oral promise of owner's agent to answer for debt of contractor cannot be made the basis for liability against agent or owner because promise within statute of frauds); *Vicksburg Manufacturing & Supply Co. v. J.H. Jeffray Construction Co.,* 94 Miss. 282, 49 So. 116 (1909) (building owner's oral guarantee for material furnished his contractor within statute of frauds.)

[1] Mississippi courts, then do not classify the type of oral promise alleged here as non-gratuitous or excepted from the statute of frauds. It is apparently undisputed that Dolphin fully satisfied its contract with its defaulting contractor, Gonzales Marine Enterprises. Mississippi law provides that once an owner, like Dolphin, has fully discharged its contract with its prime contractor, subcontractors, laborers and materialmen, like B & G, have no lien on the property or any valid claim against the owner for the debts owed them by the contractor. *See* Miss. Code Ann. § 356. *See also Phillips,* 190 So.2d at 845; *Williams v. Taylor,* 216 Miss. 563, 62 So.2d 883, 885 (1953); *Chancellor v. Melvin,* 211 Miss. 590, 52 So.2d 360 (1951). Thus, once a property owner fully discharges its obligation under a construction contract, any promise to pay more than what was originally due the contractor is gratuitous and squarely

within the Statute of frauds.[4]

[2] Nor can B & G evade the statute's grasp on the theory of unjust enrichment. While Mississippi permits that equitable doctrine to prevail notwithstanding the statute of frauds, *see Estate of McKellar v. Brown*, 404 So.2d 550, 553 (Miss.1981), Dolphin, on these facts, was not unjustly enriched. Dolphin had fully paid Gonzales for the rig construction. It did not receive anything it had not paid for. If anyone has unjustly profited and should be forced to disgorge its enrichment, it is Gonzales Marine. *See Jackson v. Sam Finley, Inc.*, 336 F.2d 148, 153 (5th Cir.1966) (subcontractor "entitled under Mississippi law to recover [from contractor] the fair value of services and materials rendered under [subcontract]"). We will not require Dolphin to pay twice for its drilling rigs.[5]

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[4] We note that after the trial of this case, a Mississippi chancery court addressed facts and parties virutally identical to those here. *See Industrial Systems, Inc. v. Gonzales Marine Enterprises Inc. and Dolphin-Titan International, Inc., et al.*, No. 16,242 (Miss. Ch. Oct. 16, 1984). In *Industrial Systems*, Dolphin again contracted with Gonzales for the construction of certain oil rigs. Industrial Systems, Inc. supplied welding materials to Gonzales for use in that construction. The supplier sued Gonzales and Dolphon on claims almost indistinguishable from B & G's here. The chancery court denied the supplier recovery against Dolphin, holding that *Gonzales Marine* was an independent contractor, not an agent or servant of Dolphin; that there was no evidence of quantum meruit; *and* that the Mississippi statute of frauds barred "any claim that Dolphin had guaranteed payment of [the contractor]'s indebtedness to [the supplier], if any, since there was not writing as required under the terms of the statute."

[5] We do not address whether the doctrine of promissory estoppel has any application here, as that theory was argued neither below nor on appeal *Reynolds Metals Co. v. Westinghosue Electric Corp.* 758 F.2d 1073, 1078 (5th Cir.1985); *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 958 (5th Cir.1984). *Compare Anderson Construction Co., Inc. v. Lyon Metal Products, Inc.* 370 So.2d 935 (Miss.1979); *Thomas v. Prewitt*, 355 So.2d 657 (Miss.1978) *with Sanders v. Dantzler*, 375 So.2d 774 (Miss. 1979); *Martin v. Franklin, 245 So.2d 602 (Miss.1971)*

III

Because we hold that the district court misapplied Mississippi law to the facts it found, we do not reach Dolphin's alternative argument branding those factual findings clearly erroneous. *See* Fed.R.Civ.P.52(a).

The district court's judgment is REVERSED.

APPENDIX "B"

B & G CRANE SERVICE, INC.

v.

DOLPHIN TITAN INTERNATIONAL, INC.

Civ. A. No. 83-2613

United States District Court
E. D. Louisiana

FINDINGS OF FACT AND CONCLUSION OF LAW

Statement of the Case

Ronnie Gonzales d/b/a Gonzales Marine Enterprises, Inc. (herinafter referred to as "Gonzales") contracted with Dolphin Titan International, Inc. (hereinafter referred to as "Dolphin") for the construction of two jackup rigs. Thereafter Gonzales rented heavy cranes and mats from B & G Crane Service, Inc. (hereinafter referred to as "B & G) for use in the construction of the rigs. B & G instituted this suit alleging that there is a balance of $173,058.27 presently due for the equipment rental and further alleging that Dolphin is liable for that total based upon Dolphin's oral promise to pay and/or unjust enrichment.

This case was tried to the court without a jury on April

26, 1984. This court hereby makes the following factual findings:

Gonzales contracted with Dolphin for the construction of two jackup rigs at a contract price of $12,300,000.00. After construction commenced, Dolphin took control of the shipyard from Gonzales. B & G leased cranes and mats to Gonzales. When Gonzales fell behind in payment for rental of the equipment B & G refused to lease an additional crane requested by Gonzales, and threatened to remove all leased equipment. In oral conversation, Dolphin's President (E. D. Shepard) and Secretary (Charles Van Duzer) each promised that Dolphin would guarantee payment of the B & G rental bill. B & G relied on these promises and permitted the equipment already at the site to remain and leased an additional crane for use by Gonzales.

Dolphin set up a zero balance account at the Whitney National Bank of New Orleans to pay the B & G bills. Using an existing account in the Gonzales name, Gonzales checks would be drawn against a zero balance. These Gonzales checks had to be approved by a Dolphin employee. When the overdraft reached the bank, then the bank would debit a Dolphin account for the amount of the check and credit the Gonzales account for that amount. This would result in the Gonzales account having a zero balance before and after each transaction.

The total claimed by B & G includes $47,748.00, the replacement cost of new mats which were lost or destroyed. The mats actually lost or destroyed in the jackup rig construction process were not new mats. Many were over 2

years old even though the useful life of each mat was 2 to 3 years. B & G failed to show the actual value of its lost and damaged mats.

It is axiomatic that a federal court in a diversity case must apply state sustantive law. The threshold question is whether Mississippi or Louisiana law applies. In order to decide this quesiton, the court must first apply the conflicts-of-law rule of the forum state, i.e., Louisiana's interest analysis approach. *Klaxon Co. v. Stenor Electric Mfg. Co.*, 313 U.S. 487, 61S.Ct. 1020 (1941). *Jagers v. Royal Indemnity Co.*, 276 So.2d 309, (La. Sup., 1973). This court concludes that Mississippi law must apply because Mississippi has the greater interest in the application of its law due to the following facts:

1. Construction of the rigs took place in Mississippi at the Gonzales shipyard;

2. Ronnie Gonzales incorporated under the laws of Mississippi to undertake the construction of the Dolphin rigs;

3. B & G supplied the equipment to the Gonzales shipyard in Mississippi;

4. Dolphin set up an office at the Mississippi jobsite and took over control of the Gonzales operations in Mississippi;

5. Dolphin's president was at the Mississippi jobsite when he orally promised to pay the B & G open account.

Mississippi statutory law provides that the promise to pay the debt of a third party must be in writing (§ 15-3-1, Mississippi Code). However, the Mississippi courts have interpreted this provision as being applicable to a *gratuitous* promise, but not a *non-gratuitous* promise. *Carolina Transformer Co., Inc. v. Anderson,* 341 So.2d 1327 (Miss. Sup., 1977). Here, we have a non-gratuitous promise by Dolphin who received the benefit of the use of the equipment supplied by B & G and used in the construction of the jackup rigs. Therefore, Dolphin is liable to B & G on for the amount due on the oral promise to pay.

In addition, since the equipment was used in connection with the construction of the Dolphin jackup rigs, and Dolphin has received the full benefit of the use of those jackup rigs, Dolphin cannot now be heard to deny that it owes payment. To deny recovery to B & G would permit Dolphin to be unjustly enriched at the expense of B & G. The Mississippi courts have held that this equitable doctrine of unjust enrichment applies notwithstanding the statute of frauds. *Carter v. Witherspoon,* 126 So. 388, 156 Miss. 597, reaffirmed in *Jackson v. Sam Finely, Inc.,* 366 F.2d 148 (5th Cir., 1966), *McKeller v. Brown,* 404 F.2d 550 (Miss. Sup., 1981).

The amount B & G is entitled to recover is $125,310.27, the amount which represents the value of use of the equipment provided by B & G. B & G has failed to prove the value of its lost and damaged mats so invoice #220 is disallowed. B & G is not entitled to attorney fees under §2781 of Title 9, Louisiana Revised Statutes because Mississippi law applies to this case and also because B &

G's relationship with Dolphin was not purely an open account. Under Mississippi Contract Law, attorney fees are not recoverable unless provided for by statute or conduct neither of which are present here, *U.S.A. on behalf of Mississippi Road Supply Co. v. H. R. Morgan, Inc.*, 542 F.2d 262 (5th Cir., 1976).

B & G is entitled to prejudgment interest on the amount due at 8% per annum from February 22, 1983 (the date of the last rental invoice) to June 30, 1984 and thereafter at 6% per annum. [See Section 75-17-1(1), Mississippi Code.] Postjudgment interest runs at 8% per annum until paid. [See Section 75-17-7, Mississippi code.

New Orleans, Louisiana, this the 24 day of July, 1984.

Patrick E. Carr

UNITED STATES DISTRICT JUDGE

B & G CRANE SERVICE, INC.

v.

DOLPHIN TITAN INTERNATIONAL, INC.

Civ.A.No. 83-2613

United States District Court
E. D. Louisiana

JUDGMENT

In accordance with the Findings and Conclusions issued by this court,

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment in favor of B & G Crane Service, Inc. and against Dolphin Titan International, Inc. in the amount of $125,310.27 together with interest at 8% per annum from the date of judicial demand until June 30, 1984, at 6% per annum from July 1, 1984 until date of judgment, and at 8% per annum from the date of judgment until paid plus costs.

New Orleans, Louisiana, this the 24 day of July, 1984.

Patrick E. Carr
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3552

B & G CRANE SERVICE, INC.
Plaintiff-Appellee

v.

DOLPHIN TITAN INTERNATIONAL, INC.
Defendant-Appellant

Appeal from the
United States District Court
for the Eastern District of Louisiana.

ON PETITION FOR REHEARING
July 25, 1985

Before REAVLEY, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge